

Zuni Indian Tribe Water Rights Settlement Agreement Little Colorado River General Stream Adjudication

Senate Indian Affairs Committee-Testimony
Malcolm B. Bowekaty, Governor
July 18, 2002

Introduction

With me are: Lt Governor Barton Martza, Wilfred Eriacho Sr- Chairman Zuni Water Rights Team, Edison Vicenti Sr- Head Katchina Leader and Pablo Padilla, Special Assistant to Zuni Tribal Council. I also have with me the Zuni Tribe's attorney, Jane Marx and Mr. Oliver Page-Hydrologist.

Overview

On behalf of my- "Ashiwi"- Zuni People, we present a settlement to satisfy our water needs for a very special and sacred place. This settlement will put finality on our tribes' century-long endeavor to restore our role as stewards of our ancestral resting grounds, our Zuni Heaven. Furthermore, our tribe has serendipitously, secured a fraction of our aboriginal land base surrounding Zuni Heaven which enable us to protect a special pilgrimage corridor to "Koluwala:wa" or Zuni Heaven. In our belief system, if it is destined, then it will be realized. Today, we are here to seek your support and advocacy to legislatively operationalize this settlement and to resolve problems should they arise.

Honorable Committee Members, I humbly follow the footsteps of some great Zuni Leaders who have fought for lost lands and securing the right to practice our form of religious sustenance from time immemorial. Honorable Governor Henry Gasper (1935-1942) who was the first to formally ask in writing the return and restoration of our Zuni Heavens Land. Honorable Governor Robert E. Lewis (1975-1989), who trail blazed new routes for our tribe to secure land and resources. Honorable Governor Edison Laselute (1974-1978) for secure passage of the 1984 Zuni Heavens Act. Honorable Governor Donald Eriacho (1995-1998) for maintaining the fight for water restoration and wetlands establishment at our Koluwala:wa. Esteemed Senators, Our tribe has only two former Governors left. I hope- I know, that this settlement will come to fruition so I can witness their peace and serenity for our tribe's accomplishment.

Significance of Koluwala:wa and Importance of Water

I beg the indulgence of this esteemed committee to share with you our tribes' view as to why this area is sacred and why it is the heart and soul of our very existence. Koluwala:wa is our nurturing place; our lifeline to strengthening our people, and to cleansing and purifying our spirits by communing with our departed fathers and our mothers. Our prayers, food offerings and ceremonies beseech from our ancestor forefathers and mothers protection, spiritual guidance, long healthy life and bountiful harvests. Our timeless connection to our ancestors is the very essence of our existence. Our people understand that from birth until death, Koluwala: wa (Zuni Heaven) is central to our existence. Our rituals, our kiva obligations, our kinship/clan obligations and our dances revolve around Zuni Heaven.

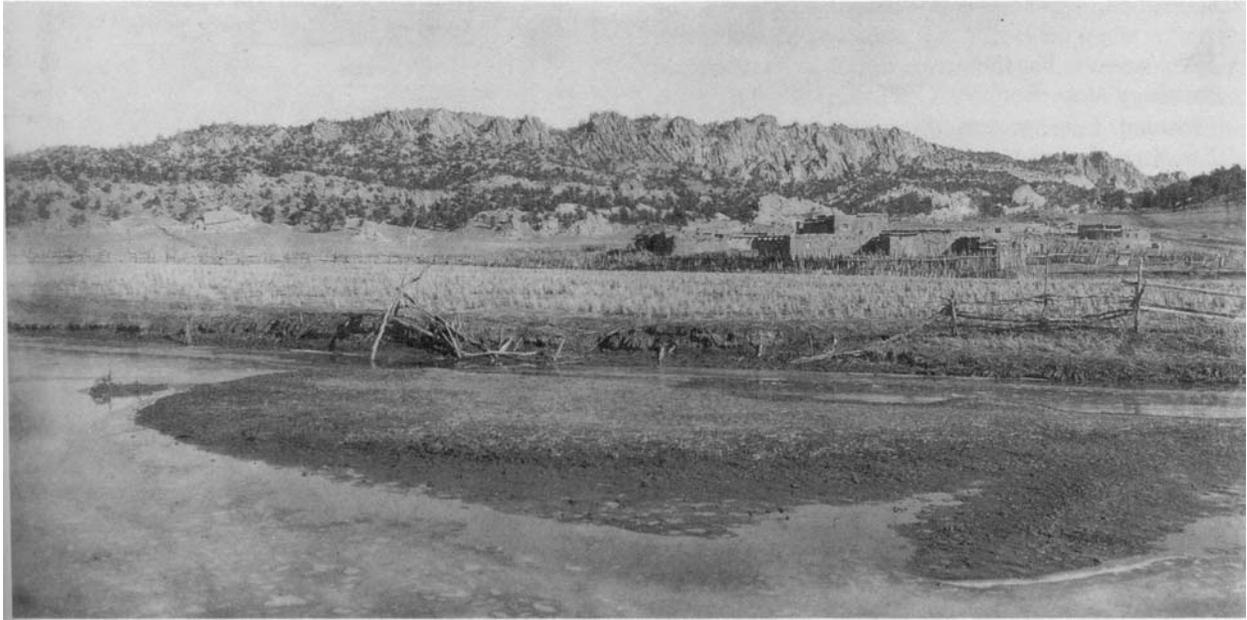
Our ceremonial calendar revolves around Zuni Heaven. The religious ceremonial dance events and religious fasting are integral to treks to our Koluwala:wa. Our religious and sustenance activities require harvesting of water, flora, fauna and minerals from Zuni Heaven; and other sacred springs. Extensive fasting and prayer precedes a solemn quadrennial pilgrimage to Zuni Heaven. Our Tribe has conducted this ceremony for over five centuries. (I refer you to Senate Report 98-441 for additional information) The common glue that binds this seemingly elaborate ceremonial cycle is water. Water is sacred! Springs, seeps, rainfall are the most precious thing on earth and to my Zuni People. The entire length of the Zuni River has always been deemed sacred from the headwaters at Nutria to the confluence of the Little Colorado River and ultimately to our Kohluwala:wa and our emergence from the waters of the Grand Canyon.

History of the Zuni River Basin and Little Colorado River Basin

The Zuni River and the Little Colorado rivers have been used for agricultural, domestic, and religious harvests by our Zuni People. We relied on steady flows from the headwaters to the Grand Canyon in times past. Agriculturally, spreader dikes were constructed to allow normal flows and flood flows to cover valley floors. Near mouths of major arroyos earthen berms were constructed to capture snowfall that built up and slowly melted to saturate the ground. Consequently, when heavy rains fell the water penetrated deeply instead of flowing in sheets and contribute to incisions and arroyo cutting. Flooding was viewed as beneficial to cleanse not only spiritually but the salts that leached from slow years. The waters were channels or media for our prayers and food offerings for religious sustenance with our forefathers in Zuni Heaven and places beyond.



This photo shows a riparian environment. Water-marshes such as this dominated the areas of the Zuni and Little Colorado rivers, the subject of this settlement (The actual Zuni River Basin in New Mexico is not part of this Agreement!). This photo was taken on our reservation, under our natural resources management control; we can protect and maintain precious water resources. Springs and marshes like this existed at Koluwala:wa.



The following photos illustrate the abundant water that was available at the turn of the century and in the early 1920's-1930's. This photo of Upper Nutria, show the river meandering through agricultural fields. No incised channels evident at this point.



This shows the springs at Blackrock prior to development the Blackrock Dam. Spring-fed pools were common along the entire Zuni River.



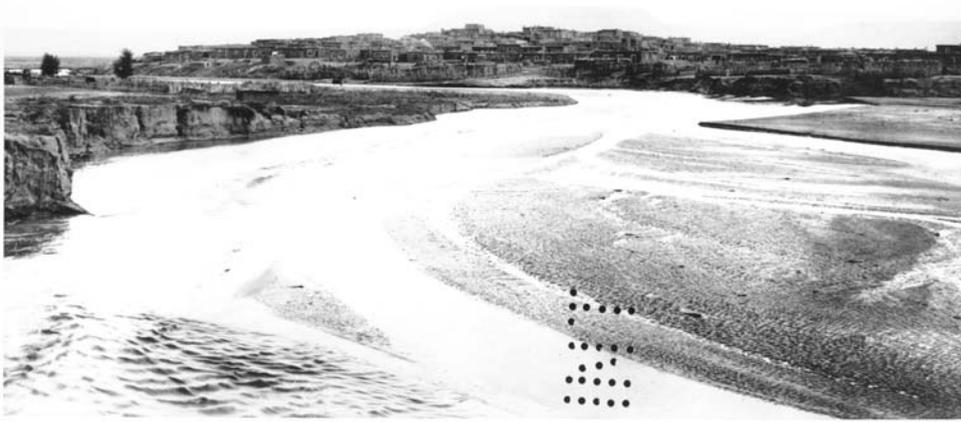
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Caretakers of springs were religious and clan inspired. They cleaned the ponds frequently and controlled growth of noxious weeds or aquatic plants.



4325 LOT 38-B=2

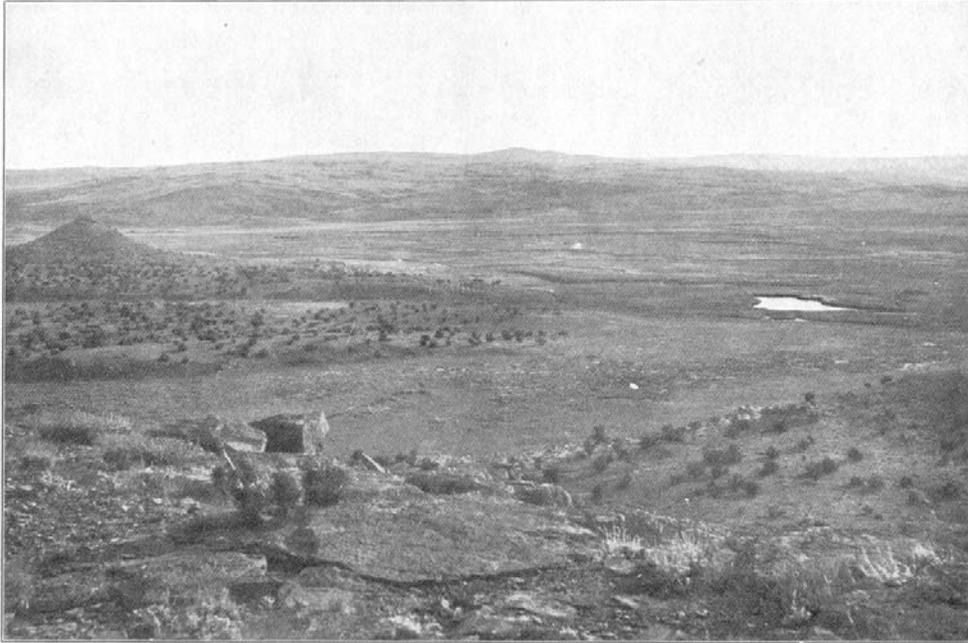
A flood scene at Zuni Pueblo contributed to flows directly to Zuni Heavens. Floods such as this cleanse the salts in slow years.



This scene depicted broad alluvial flooding at Zuni Pueblo, similar floods also occurred on the riverbank of Zuni Heaven.



Floods through the central Zuni Pueblo was common. This photo shows the aftereffects of flooding. Similar principles are applicable to the proposed Zuni Heaven restoration project.



K'OTHLUWALA'WA, JUNCTION OF LITTLE COLORADO AND ZUÑI RIVERS

This photo shows the meandering river that fed springs relied on by our religious practitioners during our quadrennial pilgrimages.



This depicts water at Zuni Heavens and a description of lush vegetation encountered by the Sitgreaves 1851 mapping expedition.

A caption in the original photo by the Smithsonian read “Leroux Island-Little Colorado River, near camp 4....Note the marshy grasses along the Little Colorado River that indicate abundant surface water in 1851.”



Current photo of Zuni Heaven condition as compared to the previous photos indicate extensive groundwater depletion. Areas such as this would be slated for our wetlands restoration project.



Extensive loss of water on the Zuni River and Little Colorado River was due to upstream diversion dams such as this at Zion Dam.



This is all that remains of Zion dam after silting and flash flooding breached this dam. The extensive buildup of silt will be useful for our restoration project.

As seen in these photos, water was abundant and flowed, unimpeded to Zuni Heaven to nurture riparian flora and fauna. We can see what is possible. Our hardy existence and continued survival is due to good stewardship of water and ecosystems that depend on it, hence it is imperative and fundamentally clear that we resume the proper restoration of our riparian areas for harvesting resources that our tribe needs.

It is clear, therefore, why settlement rather than litigation is the preferable path for my people. As you know, in 1984 Congress set aside the Zuni Heaven Reservation for the express purpose of protecting the Tribe's long-standing religious and sustenance activities on those lands. As just described to you and testimony leading to passage of Pub. L. No. 98-498, 98 Stat. 1533 (August 28, 1984) revealed, water for riparian habitat and the Sacred Lake is essential to those activities, the very purpose for which Congress set aside the Reservation. That legislation as amended by Pub. L. No. 101-486, 104 Stat. 1174 (October 31, 1990), addressed the lands to be protected but did not cover the Tribe's water needs. Thus, the United States on behalf of the Tribe filed water rights claims in the LCR basin general adjudication which has been pending since 1979. Despite the strength of my Tribe's litigation claims relating to its use and occupation of the area encompassing Zuni Heaven and its waters since time immemorial, the Tribe was motivated by the desire to secure "wet" water and not just a "paper" water right. The settlement provides for real water to be acquired by the Tribe, in an area of the Little Colorado River basin where the surface water is already over appropriated and where there also exists significant groundwater demand. Equally important, the settlement also provides the resources to be able to restore the wetlands and riparian areas on our sacred lands, an outcome we would not obtain through litigation. This settlement, thus, restores the ecosystem necessary for our sacred practices and provides the parties, and Zuni in particular, the benefit of certainty and finality without spending numerous years and extensive resources in litigation. The Little Colorado River general adjudication involves thousands of parties, including five Indian tribes; this settlement resolves the claims of one tribe, and does so with no adverse impacts on the water rights of any party in the litigation.

Overview of The Settlement Agreement

This settlement is the culmination of the Tribe's attempts to protect and restore the sacred lands of Zuni Heaven. This settlement satisfies those claims by providing water and resources to rehabilitate and restore to the Reservation a riparian habitat for the Tribe's religious and sustenance activities.

Description of the Restoration Project and Water Needs

Our restoration project will take a number of years to accomplish. Simply described, it involves acquisition of water rights, use of groundwater, aggradation of the LCR stream channel, removal of exotic plants that impede restoration of the wetlands, and planting and maintenance of native plant species. Although our goal is to restore the area to as close to natural, pre-development conditions as possible, certain hydrologic conditions may have been permanently altered by upstream dams and surface water diversions as well as extensive groundwater pumping; significant engineering planning and design is needed, as well as the "artificial" maintenance of certain wetland and riparian areas. We will endeavor to create as natural an environment as is reasonably possible.

With regard to the water requirements, the settlement provides Zuni a minimum of 5,500 acre-feet per year (afy) of water to develop and maintain its wetland restoration project. The Tribe will use both groundwater and surface water. Importantly, the parties set out to provide water to the Tribe without disrupting, to the greatest extent possible, the existing uses and expectations of the parties. The mechanism to accomplish this goal includes the voluntary acquisition of surface water rights from willing sellers in an area where water uses are changing and irrigation is declining. In the long run, the Tribe needs to acquire a total of at least 3,600 afy of surface water. The remainder of the minimum 5,500 afy of water needs will be met through appropriation of flood-type flows, development and "harvesting" of water from Zuni lands upstream of the Reservation, and groundwater pumping. The settlement recognizes the right of the Tribe to withdraw 1,500 of groundwater free from objection by the parties. Notably, the Zuni Tribe will need to acquire 2,350 afy of surface water rights over the next few years in order to effectuate the settlement and waive its claims.

The Tribe's project includes two phases: a core, initial wetland development area that includes restoration of Hadin Kaya, the Tribe's Sacred Lake. This area will be developed immediately using groundwater, and will be maintained in perpetuity even in periods of drought. The secondary wetland area will be developed using surface water, after the Little Colorado River channel has been aggraded, or raised up, on the Reservation, through removal of sediment upstream and relocation of that sediment to Zuni Heaven. The extent of the secondary wetland area is expected to fluctuate depending on surface water availability in wetter or dryer years. (Appended is a technical description by Oliver Page of Stetson Engineering on the Wetlands Project).

As noted above, the surface water rights will be acquired pursuant to state law. As such they will carry the associated state law priority dates. However, of great significance to the Tribe, once those rights have been acquired and severed and transferred to the reservation, the water takes on key attributes of a federal right: the water rights shall be held in trust by the United States in perpetuity, the water rights cannot be lost by abandonment or forfeiture, state law does not apply to water uses on the Reservation, and the state has no authority to regulate or tax the use of the

water. The settlement provides similar protection for the Tribe's use of 1,500 ac of groundwater on the Reservation.

Contributions; Development Funds:

The settlement provides for a unique partnership among the Tribe, the United States, the State of Arizona, and certain individual parties to accomplish the goals of this settlement. First, in addition to the financial contribution of \$19.25 million requested of the United States, the state parties, including the State of Arizona and other major groundwater pumpers, are contributing roughly \$8 to \$9 million dollars toward this settlement, and the Zuni Tribe itself has spent close to \$5 million dollars to acquire certain key lands and water essential to the success of the project. The extent of shared funding is unprecedented in water rights settlements. Equally importantly, however, is the creative use of state programs to support the restoration and environmental goals of this settlement. In addition to contributions from its general funds, the State of Arizona is using two state programs aimed at endangered species protection and habitat conservation to fund its contribution to this settlement. Through use of these state funds, the Tribe will receive water rights to be used for its wetland restoration project as well as dollars that will be spent for wetland restoration and maintenance purposes. Ultimately, these efforts along the Little Colorado River stream will create more habitats for threatened and endangered species. Through this partnership, Zuni restores its sacred lands, and environmental protection goals are met.

This agreement will establish the Zuni Indian Tribe Development Fund managed by the Department of Interior into which the contributions from the State of Arizona and the United States will be deposited. As noted earlier, from the federal contribution, \$3.5 million dollars will be made available immediately to secure water rights so that the settlement agreement can become enforceable. The remaining funds will be made available after the enforcement date. The Zuni Indian tribe has extensive working knowledge of the trust funds management and investment by the U.S. Treasury Department and Department of Interior's Office of Trust Funds Management. Our tribe has prudently used funds from prior settlement of land claims. We have exercised the regulatory prescribed funds draw down process for monies under Secretarial control. We have also exercised total withdrawal of monies under the American Indian Trust Fund Management Reform Act of 1994. The Congressional route for withdrawing of funds has also been successfully used by our Tribe.

The Zuni Indian Tribe will use the settlement Development Fund in the manner prescribed by this proposed legislation and by the terms embodied in the agreement. Our trustees at the Southwest Regional office and the Office of Trust Funds Management are extremely aware of our adherence to federal fiduciary standards, but more importantly, to the fiduciary standards of my people. We have met these standards and we will meet these exacting standards contemplated in this legislation.

As a final comment on the acquisition of water rights and early access to \$3.5 million to secure those rights, we have been working with the Department of the Interior to develop an approach to dealing with those particular funds that will provide the Tribe flexibility and immediate access in order to secure good priority water rights while also respecting the Department's desire to oversee use of tribal funds. We believe we have reached a workable approach using the framework provided in the Trust Fund Reform Act and will continue to work with the Department on issues pertaining to use of these funds as well as the remainder of the federal funds to be appropriated pursuant to this settlement.

Rationale for Certain Waivers and Compromise

This settlement represents many hours of working with my people to develop a workable vision and concept for restoring our sacred Zuni Heaven given the present conditions at the Reservation. In addition, the settlement is the result of more than four years of extensive negotiations involving my water rights team and our water rights attorneys. As such, it contains negotiated compromises, some of which were arrived at only after a great deal of discussion and deliberation. Several provisions I will describe required a great deal of “soul-searching” and discussion by my water rights team and Council. We firmly believe, however, that this settlement, even with some difficult compromises, provides the best possible approach to securing an adequate amount of water of sufficient quality for our religious practices.

The first of the significant compromises relates to taking lands into trust. As mentioned above, the Tribe has acquired certain lands near the Reservation that are critical to our ability to gather and send water down the Little Colorado River channel to the Reservation. Other lands along the LCR are also important to the project. To further this settlement and the needs of some parties to have certainty about the status of these lands now and in the future, the Tribe identified a key corridor along the LCR that contains lands we now own or may acquire in the future that will be taken into trust as part of this settlement. One section of land adjacent to the Reservation will also be made part of the Reservation; it is the expected location of much of the Tribe’s groundwater pumping. The legislation provides that only these lands in Arizona will be taken into trust, absent a subsequent act of Congress authorizing additional lands into trust for Zuni.

Before any lands may be taken into trust, the Tribe, the State of Arizona, and Apache County will enter into an intergovernmental agreement covering a number of water and land use issues that are identified in the settlement agreement. These issues include, for example, adoption of a tribal water code, jurisdiction by the Tribe over wildlife management, payments by the Tribe in lieu of state taxes, rights-of-way or easements for adjoining landowners, and protection of land remaining in fee status for the Tribe’s religious practices. We support the intergovernmental agreement approach as a useful mechanism for sovereign governments to use to facilitate their relationship. After considering the nature of our land and water use in Arizona for sustaining our religion and culture, lands which are not the site of my people’s homes or economic livelihood, we are also comfortable with the substantive agreements within the provisions to be covered by the intergovernmental agreement and believe they strike a reasonable balance of interests.

The next area of significant compromise relates to waiver of future water quality claims. We know that this waiver covers new ground in a water rights settlement. Again, after a great deal of deliberation and consideration of the specific circumstances of this settlement, we are comfortable with the compromises contained in the approach to waiver of these future claims. Circumstances may differ in another case where, for example, a reservation is a homeland and is located in an area with more industry or other development. Moreover, in our negotiations, we agreed to try to reach a settlement that would, as much as possible, maintain the status quo and the parties’ existing water use expectations. This may not be a goal in another context. From the Tribe’s perspective here, the location of the Reservation in a relatively undeveloped area of Arizona, combined with the state parties’ agreement to provide water quality monitoring and data on an ongoing basis, along with the broad retention of regulatory authority by the United States to address water quality or environmental problems that may arise, provide us adequate assurance that a serious problem will not go un-remedied, even if the Tribe is limited in the type of claims it can assert. We understand that the administration may be seeking to further clarify and enhance the regulatory authority of the United States to enforce environmental and water quality laws and regulations, and we will certainly work with the parties to resolve satisfactorily any lingering concerns.

Finally, I want to discuss briefly the issue of the timing of the Tribe's waiver of litigation claims and the acquisition of water rights as a condition precedent to such a waiver. As I mentioned earlier, the Tribe needs to acquire 3,600 afy of surface water rights in order to develop its project. The Tribe will waive its claims, however, when 2,350 afy of the necessary 3,600 afy of surface water is acquired. This must be accomplished by the end of December 2005. Clearly, there is a risk to the Tribe of waiving its claims before it has acquired all of the necessary water rights. However, after significant thought, we felt it the wisest use of time and resources to structure the settlement in this fashion, for several reasons. First, under the settlement agreement and legislation, the Tribe has early access to \$3.5 million dollars in order to secure the necessary 2,350 afy of water. Given the voluntary nature of the water acquisitions, we have attempted to strike an appropriate balance between a reasonably short time frame to determine whether the settlement will become finally enforceable, and a reasonable guess as to the amount of water at a reasonable price we expect could be acquired within the limited time frame. We did not want to be in a situation where we are forced to pay too much for any particular water right in order to satisfy the time deadlines, yet we need to know that we can reasonably expect to secure sufficient surface water to develop the project. The 2,350 afy amount is the parties' best estimate as to the amount of water at a reasonable price that we can anticipate acquiring with the initial funds by December 2005. We will then acquire the remainder of the water rights over time, with the State of Arizona expecting to contribute approximately 1,000 afy of water over the next fifteen years. We believe that this approach is fiscally sound and, in conjunction with our ability to use groundwater, provides us enough certainty about the ability to develop the entire wetland restoration project over time.

Conclusion

This water rights settlement agreement will allow our Zuni People to satisfy their life existence and will ensure the re-establishment of a riparian resource that benefit the entire area. We have worked closely and reasonably with all parties to keep whole their interests and to secure our interests to water and land. My Zuni Tribal Council, Religious Leaders and practitioners and most importantly our Zuni People are very comfortable with the settlement terms. Settlement funds from several sources will be sufficient to mobilize on the ground water delivery systems and the wetlands restoration efforts. Initial work has already begun as a direct result of collaboration between the Tribe and the State of Arizona.

We firmly know our non-Indian neighbors', towns and cities, industry and the State of Arizona have gained benefits far outweighing lengthy and expensive litigation. Expensive and protracted litigation still remains for the further reaches of the Little Colorado River, however, at least a significant portion is forever resolved. We believe we have addressed the fulfillment of trust obligations of the United States on behalf of our Zuni Indian Tribe.

Esteemed Senators, I again humbly for my Zuni People ask and urge your support and assistance to ratify this proposed legislation for our water rights. In our daily prescribed blessings as Governors and Tribal Councilmen, I bequeath on each of you "De'kohonne dashana awannik chiya:do"-Long healthy and bountiful life. Elahkwa!

**SUMMARY OF
ZUNI HEAVEN WETLAND RESTORATION PROJECT
LITTLE COLORADO RIVER BASIN ADJUDICATION, ARIZONA**

JULY 15, 2002

Since pre-development times, the Zuni people have used an area in Hunt Valley adjacent to the Little Colorado River (LCR) in Arizona for religious, sustenance and homeland purposes. The land, often referred to as Zuni Heaven, supported a lush riparian habitat with springs, streams and a sacred lake as late as the 1930s. The lands contained a wide variety of plant and animal species essential to the Zuni Tribe's homeland and religious practices. The sacred lake, several springs and related riparian habitat have been the core of the Zuni's religious beliefs. In 1984, Congress recognized the importance of these sites and practices when it established the Zuni Reservation in Arizona for the primary purpose of sustaining these historical activities.

Both, the bottom lands of the LCR in Hunt Valley and the sacred lake and springs have suffered ecological decline. In pre-development time, the sacred lake was sustained by surrounding springs and over-bank flow from the LCR. The ecological condition of the sacred lake and associated springs has changed significantly over the last 70 years. The riparian vegetation that once inhabited the area is no longer present. The sacred lake and most of the springs within the Reservation have become dry with loss of associated wetlands as a result of surface water depletions, dams and regional groundwater pumping. The incisement of the LCR through Zuni lands has prohibited replenishment of the lake and drained the shallow ground water that supported the native vegetation. Ground-water withdrawals in the vicinity of the Zuni lands have also contributed to the drying of the lake and springs.

PROJECT PURPOSE

Re-establish and maintain the wetland environment that existed at Zuni Heaven prior to effects from non-Indian development and restore the Tribe's ability to perform religious and sustenance activities.

PROJECT DESCRIPTION

The proposed Zuni Heaven project includes aggradation of the LCR, enhancement of the flow regimen of the LCR through acquisition of surface water rights and water salvage; the reintroduction and maintenance of native plant species; and development of a wetland environment, partially maintained by ground-water supplies, to sustain the reintroduced species.

Restoration of the wetland environment would involve reestablishing: (1) a primary wetland area including the sacred lake that would be maintained with ground water when surface water supplies are not adequate; and (2) a secondary wetland area that would be served by available surface water supplies and subject to water shortages. The minimum project acreage to receive water would be approximately 700 acres.

The proposed project features an integrated ground water / surface water system to serve the wetland water needs. Initially, canals and pipelines would distribute ground water pumped from wells to the primary wetland areas. As soon as the LCR has aggraded to the point where surface water can be diverted, surface water would begin to replace ground water for the maintenance of the primary wetland and would also serve the secondary wetland. Upon complete aggradation of the LCR, surface water would be used almost exclusively to maintain both wetlands. An off-reservation well field or the alternative, an off-stream reservoir, would be developed as part of the project to optimize supplemental surface water supplies.

WATER REQUIREMENTS

The estimated annual water requirements of a fully developed project would be as follows:

Primary Wetlands	1,500	Acre-Feet
Secondary Wetlands	<u>4,000</u>	
Total	5,500	Acre-Feet

WATER SUPPLY

Under a fully developed project, ground water would be expected to meet 200 to 300 acre-feet per year (AFY) of the demand (sacred lake and other portions of the primary wetland). Surface water would meet the balance (5,200 to 5,300 AFY) of the water demand.

The sources of water for wetland maintenance include: (1) the LCR; (2) salvaged consumptive use of water from an area of land just upstream from the Reservation, referred to as the Meadows; and (3) water-right acquisitions.

IMPACT ON LITTLE COLORADO RIVER FLOWS

The proposed Zuni Heaven restoration project would not adversely impact the flow of the LCR downstream of Zuni Heaven. In fact, the proposed project would enhance the flow. Depletion of LCR flow would be primarily from the consumptive use of flow by the reestablished wetland vegetation. This depletion is more than offset by the removal of Zion Dam (part of proposed project), development of salvaged water, and the acquisition of upstream water rights. Flows would be enhanced, on average, by 1,700 AFY.

SETTLEMENT FUNDING REQUIREMENTS

The funding required to restore the Zuni Heaven wetland environment is \$27.25 million, consisting of approximately \$20.3 million for capital improvements, re-vegetation, and water acquisition, and \$7.0 million for a trust fund to maintain the reestablished wetlands in perpetuity.